town close to Houston, Texas, for the breakfast, Bohuchot and Wong were there. (V245/456.) Bohuchot introduced Wong as "the man." (V245/458.)

Although both Bohuchot and Wong were excited about the boat, Bohuchot was the one who discussed Tingley's duties, which included transporting the boat from Galveston, maintaining and operating the boat, and instructing Bohuchot, and who negotiated his $40,000 salary.[16] (V245/457.) Tingley moved the boat from Galveston to Blue Dolphin Marina in Sea Brook, Texas. (V245/466.) Renaming the boat "Sir Veza," Bohuchot, through Wong, set up a petty cash account for Captain Tingley to cover the boat's expenses. (V245/457-458, 462, 490.) He instructed Tingley to call him if he had any questions. (V245/565.)

Tingley felt that he was working for Bohuchot, although MSE, through Statewide Marketing, owned the boat and paid all of the bills associated with it. (V245/458, 473-476, 548.) Statewide was owned by the same three men who owned MSE. (V246/727.) Although Tingley picked the boat's new location, he did so based on instructions he had been given by Bohuchot, who had to approve the ultimate choices made by Tingley. (V245/466.) Bohuchot told him that he wanted the boat under a cover and that he preferred a deck that would

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[16] From the beginning, Bohuchot wanted Tingley to teach him how to safely operate a boat of that size. (V245/497.) The captain taught him how to start and control the boat, and how to operate its systems; Bohuchot wanted to know every aspect of boat operations. (V245/497.)

accommodate a barbecue and table. (V245/466.) Tingley ordered gear for the boat on Bohuchot's orders, including fishing tackle, electronics, and maintenance items. (V245/468.) Bohuchot, who loved to fish, used the boat every couple of weeks during the eight-month long season. (V245/467-468.) He also sometimes used the boat out of season as well. (V245/468.) Wong did not always accompany Bohuchot on the boat. (V245/468.) The captain talked to Bohuchot every other day about matters concerning the boat during the time that MSE owned the Sir Veza; he very seldom talked to Wong. (V245/491.)[17]

A second boat – a 59-foot Viking – was purchased by Statewide for $789,000 in June of 2004, and renamed "Sir Veza II." (V245/469-471; GE77.) Only Bohuchot, who made the exception to the rule, was permitted to walk in his shoes on the white carpet in the main salon of the boat. (V245/477-478.) Statewide also paid the costs associated with running the boat, including paying expensive entry fees for fishing tournaments[18], with Bohuchot again making many

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[17] Bohuchot had Captain Tingley keep a guest register on Sir Veza that every guest was suppose to sign, with the exception of Bohuchot, but eventually he told the captain to take it off the boat. (V245/521-524; GE52.)

[18] Bohuchot did not attend an awards banquet for a fishing tournament because, as he told the captain, he did not want the exposure that the published photographs of the winners might bring. (V245/484-485.)

of the decisions about the boat[19], at least until he stopped using it in mid-July of 2005 after a newspaper story about an investigation into the contracts was published.[20] (V245/478, 480-483, 489, 534-536.) After Sir Veza II was purchased, the captain talked to Bohuchot about boat matters at least twice each week; he talked to Wong with the same frequency. (V245/492.) After mid-July, Captain Tingley had no more conversations with Bohuchot about the boat. (V245/492.)

Captain Tingley thereafter moved the boat to Destin, Florida, on orders from Wong. (V245/536.) During the six-month period that the boat was in Destin, neither Wong nor Bohuchot came down to use the boat. (V245/536.)

Although others used the boats without Bohuchot being present, it is clear that the boats were mainly for Bohuchot's enjoyment. (V245/573-577, 583-584.) Bohuchot used the Sir Veza about 90 percent of the time that it was used, and Sir Veza II about 80 percent of the time it was in use. (V245/539.) Once, a trip for an MSE executive was cancelled because Bohuchot wanted to use the boat. (V245/537.) Over the years, three trips were made to Key West, with Bohuchot

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[19] In addition to directing the captain about purchasing food and drink supplies for the two boats, Bohuchot even determined how much the deckhands would be tipped from the petty cash fund provided by Statewide Marketing. (V265/494-495.)

[20] In subsequent newspaper and DISD interviews in July of 2002, Bohuchot falsely claimed to have paid for the 2004 trip to Key West. (V247/1060-1064.)

contacting Tingley and setting the dates. (V245/528-529.) It would take the captain between four and six days to move the boat from Texas to Florida, at a cost of approximately $15,000 per trip. (V245/528.) Each trip lasted between four and six weeks. (V245/529.)

When Captain Tingley told Bohuchot that the $1000 petty cash fund was insufficient for a Key West trip, Bohuchot arranged for him to get an American Express card from Frankie Wong, with Wong's name on it. (V245/491.) Tingley used the American Express card to pay for Bohuchot, and whomever Bohuchot wanted to take, when they would go out to dinner after being on the boat. (V245/524-525.) Once when Bohuchot chose a location that would not take the card, Bohuchot went to Wong and had him okay taking money out of the boat safe that was destined for another purchase to pay for dinner. (V245/525-527.)

On one occasion, Captain Tingley told Wong that he wanted to make a rule to prevent Bohuchot and others from operating Sir Veza when they had had too much to drink, but Wong informed him that he was not going to let him do that. (V245/498-499, 518, 611.) Wong told him that, if Bohuchot was upset and did not want to use the boat, Wong no longer had a need for the boat. (V245/518-519.) Because he wanted to keep his job, Tingley never brought the subject up again. (V245/611.)

It was also clear that there was a connection between the contracts and the boats. The captain was once told by Bohuchot to wait on upgrading some boat equipment because Wong was waiting for money to be released on a contract he had been awarded by the school district. (V245/539-541.) Bohuchot later told the captain that the funds had been received and that it was okay for him to make the purchase. (V245/542.)

Bohuchot talked to Tingley about the Sir Reza someday belonging to him (Bohuchot).[21] (V245/520.) When Sir Veza II was being purchased, there was some consideration of keeping both boats and having Captain Tingley operate both. (V245/520.) The decision was ultimately made to have only one boat. (V245/521.)

The evidence also showed that Wong and Bohuchot funneled money to Bohuchot through Bernard Cabatingan, Bohuchot's son-in-law.[22] Cabatingan,

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[21] Once when Bohuchot had some friends from Kinko on the boat, he asked Tingley to pretend that the captain and his wife owned the boat and to entertain his friends. (V245/527.)

[22] Bohuchot also induced Coleman to provide $10,000.00 to Cabatingan and Bohuchot's daughter, in mid-2003, for their moving expenses from California to Dallas, through Coleman's company, Kenbridge Consulting Services. (V264/2623-2627, 2518; GE166.) The Cabatingans needed financial assistance due to Cabatingan's long-term unemployment and his wife's serious medical condition. (V264/2623.) Although the $10,000.00 was denominated a loan, Bohuchot told Cabatingan the loan would be forgiven, even before the Cabatingans received the check. (V264/2628-2629.) Bohuchot also arranged for Coleman to pay in excess of $3,000 for Cabatingan to participate in a Cisco certification class. (V264/2632-2637; GE169-170.) The evidence showed that Bohuchot was instrumental in securing Coleman's consulting work with MSE, which had several indicators suggesting fraud. (V266/2963, 2983-2985, 3001-3004, 3061-

who moved to Dallas after a long period of unemployment to live with his in-laws, was told by Bohuchot that he was going to get a job through MSE. (V264/2614, 2622-2623, 2631.) He was hired by Wong to work on the E-Rate project, and worked from April of 2004 until October of 2005 as a network engineer doing equipment staging, for a salary of $60,000. (V264/2638.) In addition to his paycheck from MSE, Cabatingan also received monthly checks from Acclaim, the company that managed the invoicing for the consortium and distribution to it, which continued until about March of 2006, even though he had stopped working for MSE.[23] (V264/2640-2642; V265/2852.) Cabatingan did no work for Acclaim. (V264/2642.) When Cabatingan told Bohuchot that his salary was probably going to stop when his employment with MSE ended, Bohuchot told him that "that can't happen." (V264/2642-2643.)

Bohuchot had told him that he would be receiving the second paycheck and the amount he would be paid, which was $3750 twice monthly. (V264/2645-2646,

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3062, 3086; GE172-175.) Kenbridge Consulting, Coleman's company, received money only from MSE. (V265/2854.) Coleman was paid $256,850 for about 40 hours of work, and felt pressured to comply with Bohuchot's requests. (V266/2990, 3102.)

[23] The additional money actually came from several sources: MSE, Acclaim, Analytical Computer Services and NEH Holdings. (V265/2870-2879; GE82-83.) NEH Holdings was a payroll company that Acclaim paid to distribute their payroll. (V265/2877-2878.) From the evidence, it can also be inferred that MSE, Acclaim, and Analytical Computer Service, a consortium member and contributor of funding to Statewide, were interlinked and passed money back and forth. (V265/2575.)

2652-2653, 2658, 2732.) Bohuchot instructed Cabatingan to give a portion of the money to him, initially to be $50,000.00 gross per year. (V264/2646-2647.) Cabatingan was to keep 40 percent of the money to pay his income taxes. (R264/2647, 2688.) Bohuchot later told Cabatingan that he wanted a certain sum of money by the end of the year that would equate to monthly payments of $5,000. (V264/2647.) Cabatingan kept the money he received from Acclaim in a separate account to prevent commingling with his personal account. (V264/2649-2650.)

Bohuchot arranged a $50,000 loan from Wong/Acclaim to Cabatingan right around the time that Cabatingan started working for MSE. (V264/2659-2662; GE126.) Cabatingan gave $5,000 of it to Bohuchot. (V264/2662-2663; GE127.) Bohuchot told him that he would not have to repay the money. (V264/2664.) The government introduced evidence showing that the parties had attempted to disguise the nature of the $50,000 "loan" by drawing up documents showing loan payments supposedly taken from Cabatingan's wages, and back-dated documentation showing a loan agreement. (V264/2664-2670; GE125A.) In February of 2005, Bohuchot made arrangements for $12,000 to be given to Cabatingan on his behalf from Wong via a MSE check when Cabatingan did not have enough money in the account to accommodate Bohuchot's request for more money without dipping into tax reserves. (V264/2683-2689, 2493; GE119-120.)

Cabatingan paid bills for Bohuchot from the account in which he deposited the Acclaim checks, including making a deposit to the Teachers Retirement System for Bohuchot so that he could retire at an earlier age, and giving cash directly to him on a monthly basis, as well as occasional additional amounts. (V264/2671-2683, 2698; GE103-111, 116, 118, 121.) The government introduced into evidence a chart made by Cabatingan in which he kept a record of the money he gave to Bohuchot, which totaled $71,109.85. (V264/2707-2717; GE101.) Cabatingan received a total of $152,500 over the relevant period from Acclaim/NEH Holdings. (V264/2718-2720; GE141-144.)

Cabatingan had a conversation with Bohuchot in which he told Bohuchot that he was uncomfortable with giving him cash because it could be construed as a kickback. (V264/2695.) Later, after he had been subpoenaed by the grand jury, Cabatingan had a conversation with Bohuchot in which Bohuchot instructed him to tell the grand jury that the money he gave to Bohuchot was repayments for living expenses when Cabatingan and his wife lived with Bohuchot. (V264/2696-2697, 2720-2730, 2731-2735.) Cabatingan told Bohuchot that such a position was incredulous, given the amount of money involved. (V264/2732.)

The government introduced evidence showing that, between 2002 and 2005, Wong provided Bohuchot, Bohuchot's wife, and his family members with airline

tickets, hotel accommodations, meals, and other miscellaneous expenses for multiple stays in Key West, Florida, totaling almost $31,000. (V246/621-625, 652-683, 730-735; GE201, 210-233.) In addition to providing him with tickets to sporting events, including suites and catering, and paying for his participation in golf tournaments, Wong also let Bohuchot use accumulated HP bonus points to purchase computer equipment for himself and others. (V259/146; V244/156-161, 165-168, 171-172; V246/735-746, 752-746; GE44-45, 47-49, 51.)[24]

Testimony from Kim Ngang, Wong's assistant, who began working for him in July of 2003 after having been introduced by Bohuchot, established that she kicked back to Wong a portion of MSE commissions, fraudulently inputted to her as earned income, totaling about $213,243 in cash. (V246/722-723, 761-780.) Wong told her to take 40 percent out for taxes and then split the remainder between the two of them. (V246/772-773; GE151.) Wong also received $2.2 million dollars from Acclaim beyond anything he received directly from MSE. (V265/2858.)

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[24] The government introduced evidence that Bohuchot did not report any income, other than his DISD salary, for the two years alleged in the indictment question. (V259/168-188; GE176; GE178.) This evidence was the basis of Bohuchot's conviction under counts 14 and 15.

## SUMMARY OF THE ARGUMENT

1. and 2. Neither the government in its introduction of evidence or argument, nor the court in its instructions amended the indictment. The evidence and argument complained of (1) provided background; (2) showed that Bohuchot had the advance information to provide to Wong, or (3) rebutted the defense. The jury instructions, which referred the jury back to the indictment, did not authorize conviction on a theory beyond that alleged in the indictment. Contrary to appellants' contentions, the evidence was sufficient beyond a reasonable doubt to establish, as alleged in the indictment, that Bohuchot, in exchange for money and benefits, corruptly provided advance information to HP/MSE for the purpose of helping them submit a winning RFP proposal to DISD.

3. Wong failed to show that the prosecutor commented on his decision to forego testifying, where the challenged remark was directed equally at him and Bohuchot who did testify.

4. By directing the jurors to read the indictment, which appellants acknowledge sets out the proper *mens rea*, and to convict only if they found that appellants conspired to violate 18 U.S.C. § 1956(a) as charged, the court provided clear and correct instructions to the jury.

5. and 6. Appellants' sentences are neither procedurally nor substantively unreasonable. The record supports the court's decision to calculate the value of the bribes received by Bohuchot, in part, by using 90 percent of Sir Veza's ownership, operation, and maintenance, and 80 percent of Sir Veza II's. The evidence established that, in exchange for his aid in helping MSE secure benefits from lucrative DISD contracts, Bohuchot was given the use of the two boats to the extent of becoming their defacto owner. Likewise, the record supports the court's decision to enhance appellants' offense levels based on a finding of more than one bribe. The payments and benefits provided to Bohuchot spanned both the Seats Management and the E-Rate Year Six contracts, providing adequate support for the court's factual finding. Given that appellants' sentences are well below the guidelines range, they cannot show them to be substantively unreasonable.

## ARGUMENT AND AUTHORITIES

I. and II.

### THERE WAS NO CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

Wong and Bohuchot contend that the government's proof and the district court's jury instruction constructively amended the indictment, permitting conviction on a factual theory not alleged in the indictment, and that an automatic

reversal should ensue. Additionally, because they claim the evidence was insufficient to establish guilt beyond a reasonable doubt as to the bribery theory alleged in the indictment, they argue that this Court should render an acquittal rather than a remand. Their contentions have no merit. There was no constructive amendment, and, contrary to appellants' contention, the evidence was sufficient to prove the advance information theory.

For purposes of the bribery conspiracy and the substantive bribery counts, the indictment set out that

> [t]he receipt of non-public information relating to the upcoming contract before the information was provided to other vendors assisted MSE and the said company known to the Grand Jury in submitting a winning bid proposal to DISD, [and]
>
> * * *
>
> [i]n an effort to ensure that MSE would receive payment as a result of the awarding of DISD contracts, **Bohuchot** would and did cause non-public information to be provided to **Wong** before the information was provided to competitors of MSE.

(Wong - R3/28, 33.)

Appellants contend that, by token of this language, the government alleged a quid pro quo, and that such quid pro quo was required for conviction under 18

U.S.C. § 666.[25] They argue that the government improperly suggested – and the instructions impermissibly permitted – conviction based on non-indicted quid pro quo allegations that Wong bribed Bohuchot "(1) to manipulate the flow of information to the board of trustees; and (2) to select favorable evaluation committees; then (3) to influence or pressure those committees; and (4) to create favorable scoring matrixes or perhaps tamper with the scores; and finally (5) to rush the proposal-review process." (Wong Brief, p. 19.) In addition, Bohuchot argues that the government was forced to offer alternative theories of who he gave insider information to because HP actually won the Seats Management contract, and not MSE. (Bohuchot brief, p. 9.)

In all its permutations, their argument amounts to a claim that quid pro quo is an essential element of 18 U.S.C. § 666 that must be alleged and proved for conviction under the statute, and the government impermissibly amended the indictment by introducing evidence of alternative quid pro quo allegations, and arguing for conviction based thereon. Appellants are wrong.

Generally, "[a] constructive amendment occurs when the trial court 'through its instructions and facts it permits in evidence, allows proof of an essential

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[25] A quid pro quo is "a specific intent to give or receive something of value in exchange for an official act." *United States v. Valle*, 538 F.3d 341, 346 (5th Cir. 2008), quoting *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999).

element of a crime on an alternative basis permitted by the statute but not charged in the indictment." *United States v. Griffin*, 324 F.3d 330, 355 (5th Cir. 2003), quoting *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991). An indictment may also be amended constructively by the actions of the prosecutor. *United States v. Salinas*, 654 F.2d 319, 324 (5th Cir. 1981). When a constructive amendment has occurred and error has been properly preserved, "the conviction cannot stand; there is no prejudice requirement." *Griffin*, 324 F.3d at 355, quoting *United States v. Mikolajczyk*, 137 F.3d 237, 243 (5th Cir. 1998).

Under the plain language of the statute, however, there is no requirement of a quid pro quo for a conviction under section 666. The focus of section 666 statute is the corrupt solicitation or gift-giving of something of value with an intent to be influenced in connection with the business of an agency: "To be guilty of bribery under 18 U.S.C. § 666(a)(2), a defendant must 'corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State ... in connection with any business, transaction, or series of transactions of such ... agency involving anything of value of $5000.00 or more.'" *Griffin*, 324 F.3d at 357. To be guilty of bribery under section 666(a)(1), a defendant, who is an agent of an organization or an agency of a state or local government, must corruptly solicit or demand for the

benefit of any person, or accept or agree to accept, anything of value from any person intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such agency involving anything of value of $5000.00 or more. *See* 18 U.S.C. § 666(a)(1).

Because quid pro quo is not an essential element under section 666, then any "amendment" of it by evidence or charge would not amount to a fatal constructive amendment, but a variance.[26] *See United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) ("By its terms, [section 666] does not require the government to prove that [a defendant] contemplated a specific act when he received the bribe; the text says nothing of a quid pro quo requirement to sustain a conviction, express or otherwise"); *United States v. Gee* , 432 F.3d 713, 714-715 (7th Cir. 2005) ("A quid pro quo of money for a specific legislative act is sufficient to violate the statute, but it is not necessary. It is enough if someone 'corruptly solicits or demands for the benefit of any person, or accepts or agrees to

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[26] A material variance occurs "when the proof at trial depicts a scenario that differs materially from the scenario charged in the indictment but does not modify an essential element of the charged offense." *United States v. Delgado*, 401 F.3d 290, 295 (5th Cir. 2005). In determining whether a variance occurred, the Court compares the evidence presented at trial with the language of the indictment. *See United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 1998). If a variance did occur, reversal is required only if the variance prejudiced the defendant's substantial rights. *See Delgado*, 401 F.3d at 295; *Medina*, 161 F.3d at 872. In determining whether a material variance resulted in prejudice, the Court employs a harmless-error analysis. *United States v. Ramirez*, 145 F.3d 345, 351 (5th Cir. 1998); *United States v. Dean*, 59 F.3d 1479, 1491 (5th Cir. 1995).

accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more.'" ); *But cf. United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (proof of intent to engage in a quid pro quo is part and parcel of the "corrupt intent" element of bribery).

It is unnecessary for the Court to determine whether quid pro quo is an element of section 666 here, where there was no amendment or variance. First, the underlying theme of appellants' argument can find no purchase in the record. It was the thrust of the government's evidence and proof that Bohuchot corruptly provided advance information to MSE/HP in exchange for money and benefits from Wong. As set forth in its Statement of Facts and discussed hereinafter, the government offered significant direct and circumstantial evidence that Bohuchot provided advance information to MSE/HP as alleged in the indictment. Therefore, there was no need for the government to "switch" theories in the middle of trial.

Second, much of the evidence complained of by appellants was not for the purpose of introducing a "new" quid pro quo, but (1) to provide a backdrop for the evidence of appellants' guilt; (2) to show that Bohuchot had the information to provide to Wong, either because members of his staff developed such information

or because Bohuchot himself decided what would be included in the RFP as chief of the technology department; and (3) to rebut the defense.

For example, when the government asked questions of Dr. Larry Groppel, DISD deputy superintendent, about Bohuchot being a source of information about the RFPs, such evidence showed that Bohuchot had the advance information to provide to MSE/HP. Moreover, Dr. Groppel was the government's second witness – the first one was a government agent whose testimony proved that DISD received the required jurisdictional amount in each of the years covered by the indictment – and his testimony went mainly to establishing that Bohuchot was an agent of DISD, how the bidding process worked within DISD, and the process by which the school district entered into contracts. (V257/2035-2051.) By the time Dr. Groppel testified, there certainly had been nothing suggesting that the advance information theory was floundering. Much of what appellants complain about in Dr. Groppel's testimony came on redirect examination (Wong brief, p. 20; V258/2134-2139), and was responsive to defense counsel's questions suggesting that Bohuchot's involvement in the decisions of DISD board of trustees' contract authorization was non-existent. (V258/2081-2102.)

Evidence that Bohuchot helped select the evaluation committee members and helped create the evaluation matrix, and that the process for the E-Rate

contract RFPs was rushed, simply provided background information about the process by which the winners were selected. Such evidence does not prove, and was not used by the government to suggest, that Bohuchot was bribed by Wong to select favorable committee members or a favorable evaluation matrix, or to rush the E-Rate RFPs. The fact that Bohuchot was involved in the development of the evaluation matrix does show, however, that he had the advance information that he is alleged to have provided to MSE/HP.

Appellants point to several comments in the prosecutor's rebuttal closing argument which they claim show the government was arguing for conviction based on non-indicted allegations of quid pro quo. (Wong brief, pp. 21-25.) Those comments, however, were responsive to defense argument,[27] were not the basis for the government's argument to the jury that appellants were guilty, were minimal in comparison to the totality of government's argument that appellants were guilty because of the exchange of advance information for money and benefits, and certainly would not amount to a material variance resulting in

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[27] Counsel for Wong had argued that his client was not guilty because there was no evidence that anyone had attempted to interfere with the usual process. (V271/3411.) Bohuchot's counsel argued against a finding of guilt because he was not on the evaluation committee, and there was no evidence showing that he had attempted to influence them. (V271/3376-3377.)

prejudice.[28] (V271/3434-3466.) *See Delgado*, 401 F.3d at 295; *Medina*, 161 F.3d at 872.

Contrary to appellants' assertions, changing quid pro quo was not the defensive theory at trial or in closing. To illustrate that point, appellants note that defense counsel "did what he could during closing argument to point out the government had switched theories mid-trial: 'Now, why are they switching theories and switching horses? I guess because they want to throw one out there or ride one as long as they can until that one is debunked.'" (Wong brief, p. 26.) Defense counsel was not pointing to different theories of quid pro quo, however, he was arguing that the government had switched theories about the **particular** advance information that had been provided by Bohuchot. (V271/3403-3404, 3405, 3408.)

The jury instructions did not authorize conviction on a theory beyond that alleged in the indictment. Unlike in several of the cases cited by appellants, the district court did not affirmatively instruct the jury that it could convict based on a

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[28] For example, in the opening round of closing argument, the prosecutor argued, "Ruben Bohuchot worked with the DISD, and he missed his contractor lifestyle, but he found someone who could give him that lifestyle that he was accustomed to. Frankie Wong and MSE. All Mr. Bohuchot had to do was provide Frankie Wong with preinformation about RFPs coming out. He gave them specific enough to benefit MSE, specific enough to provide him an advantage and in return Frankie Wong was able to give him what he desired, the things he loved, golf, fishing, boats, gifts, and money. (V271/3340.)

prosecutorial theory not in the indictment. The jury instructions followed the language in the statute as set out in the indictment, provided a definition of "corruptly," and repeatedly directed the jury to read the relevant count as set forth in the indictment in its deliberations.[29] (Wong - R3/504, 506-507, 509-510.) Such counts included only the government's theory that Bohuchot had provided advance information to Wong.

The evidence was sufficient to prove appellants' guilt with respect to the bribery counts

Appellants are flat wrong when they argue that the evidence is insufficient to establish guilt on the "indicted bribery theory, " such that an order of acquittal should be entered by the Court rather than remand for a new trial in conjunction with their constructive amendment claim. (Wong brief, p. 37.) As recounted in the government's Statement of Facts, both Blair Thomas, the Director of Sales and Operations for MSE in Dallas, and Garrett Goeters, an HP account executive in Dallas, testified that they had multiple meetings with Bohuchot in which he provided non-public information about the upcoming Seats Management program

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[29] "The word 'corruptly,' as that [sic] terms is used for these counts, means that the act was done voluntarily and intentionally and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The motive to act corruptly is ordinarily a hope or expectation of either financial gain or other benefit to oneself or some profit or benefit to another." (Wong - R3/507.)

that helped HP/MSE prepare their response to the DISD RFP; in particular, exactly how Bohuchot envisioned the program would work, the requirement that the bidders have a billion dollars in revenue, and the necessity of including significant value-adds. In fact, without the pre-information about the billion-dollar revenue requirement, MSE might not have been able to partner with HP on the contract.

Thomas's testimony was especially damaging. He testified that, **at the first meeting with Bohuchot**, Bohuchot described the Seats Management program "[v]ery roughly, 50,000-foot view." (Wong - V248/997.) Thomas further testified, however, that he had about ten meetings with Bohuchot to discuss the Seats Management program between October 2001 through May of 2002. (Wong - V248/998-999.) According to Thomas, during this same time period, Wong had discussions with Bohuchot about the Seats Management program, both with and without Thomas being present. (Wong - V248/999-1000.) By the time Thomas saw the draft RFP on the trip to Key West – that Coleman likewise testified Bohuchot showed around – he "believed we were highly qualified to bid on the RFP with our partners in place and ready to prepare our response." (Wong - V248/1015.) Goeters also testified to having multiple and specific conversations with Bohuchot in which they discussed the upcoming Seats Management RFP, and that the information provided by Bohuchot helped HP/MSE prepare their bid

because they had more time to respond and were better qualified to respond. (Wong - V261/2238-2245; Wong - V245/62.)

In addition to being rebutted by the record, appellants' argument – "that the information MSE received was immaterial, did not give HP an advantage in submitting a superior proposal, or likely was shared with competing companies"[30] – is stymied by evidence showing Bohuchot was generously rewarded by Wong for his help. It was also from this excessive "generosity" that the jury could infer that Bohuchot improperly aided Wong with respect to the E-Rate contract. Although there was no direct evidence showing how Bohuchot helped Wong and the consortium win the E-Rate contract, the evidence that a substantial amount of E-Rate contract money was surreptitiously funneled from Wong to Bohuchot via his son-in-law, in conjunction with evidence showing that Bohuchot actively aided Wong and MSE to secure the Seats Management contract, is circumstantial evidence from which the jury could reasonably infer that appellants violated section 666 with respect to that contract as well. *See United States v. Moeller*, 80 F.3d 1053, 1057 (5th Cir. 1996) (defendants' guilt on section 666(a)(1)(A) charges inferred from circumstantial evidence).

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[30] (Wong brief, p. 37.)

III.

## THE GOVERNMENT DID NOT COMMENT ON WONG'S DECISION NOT TO TESTIFY

(Responsive to Wong's Third Point of Error, pp. 48-49)

Wong contends the prosecutor impermissibly commented on his decision to forego testifying. His contention has no merit, where the remark he challenges was not directed to his decision to forego testifying, but was an argument from which the guilt of both Wong and Bohuchot could be inferred.

Standard of Review

Wong did not object to the prosecutorial comment that he challenges on appeal; thus, his contention is reviewed for plain error. *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Ward*, 481 F.2d 185, 187 (5th Cir. 1973). To establish plain error, a defendant must show (1) error, (2) that is plain, and (3) that affects the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). If all three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

The challenged comment was not directed to Wong's decision to forego testifying

By virtue of the Fifth Amendment, a prosecutor is prohibited from commenting either directly or indirectly on a defendant's failure to testify or produce evidence. *United States v. Wharton*, 320 F.3d 526, 538 (5th Cir. 2003), citing *Griffin v. California*, 380 U.S. 609, 615 (1965). In determining whether a prosecutor has made such a remark, this Court considers "1) whether the prosecutor's manifest intent was to comment on the defendant's silence or 2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *United States v. Green*, 324 F.3d 375, 381-382 (5th Cir. 2003).

"If there is an 'equally plausible explanation for the remark,' the prosecutor's intent is not manifest." *Green*, 324 F.3d at 382, quoting *United States v. Grosz* , 76 F.3d 1318, 1326 (5th Cir. 1996). "[T]he question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury *necessarily* would have done so." *Grosz*, 76 F.3d at 1326, quoting *United States v. Carrodeguas*, 747 F.2d 1390, 1395 (11th Cir. 1984). "[T]he comments complained of must be viewed within the context of the trial in which they were made." *Wharton*, 320 F.3d at 528, quoting *United States v. Dula*, 989 F.2d 772, 776 (5th Cir. 1993).

Wong complains that the following remarks by the prosecutor in her rebuttal violated the ban against commenting on his decision not to testify:

> [Ms. Elieson]: What else is happening during this time period? May, 2002, this trip to Key West we know Mr. Bohuchot was on it. Mr. Coleman was on it. Mr. Wong was on it, and Blair Thomas was on it. The four men two of which talked to you about the RFP being there and the other two are sitting here.

(V271/3442.)

Wong's contention has no merit where no jury would have necessarily viewed the remarks as a comment on his decision not to testify. In her argument, the prosecutor refers to "the other two are sitting here," meaning Bohuchot and Wong, but she could not possibly have been pointing to Wong's failure to testify, where **Bohuchot did testify**. Therefore, no juror would have naturally and necessarily believed that she was commenting on Wong's decision not to testify when she referred to both men in her comment. Instead, read in context, the prosecutor was arguing that two of the four men in the van testified that the RFP was in the van, the presence of which pointed to the guilt of the other two men in the van – Bohuchot and Wong.

The prosecutor's comments did not infringe on Wong's constitutional rights, and he certainly cannot show plain error where the court gave specific